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# Supreme Court of the United States

OCTOBER TERM 1934.

No. 625.

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REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

*Petitioners,*

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*,

*Respondents.*

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## *REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.*

Petitioners feel it necessary to answer certain misleading statements in the brief of the respondent Eugene F. O'Connor, Jr., and pray leave of the court to submit this short reply brief.

### I.

### Respondent mis-states the issue.

The statement of the issue presented for review (at p. 2 of Respondent's Brief), is misleading and question-begging. The composition involved is not one where "creditors are to be paid 100%". The amount to be paid to creditors upon the confirmation of the composition is only 15% of the amount of their claims as filed and allowed or scheduled.

The issue is whether the presently outstanding bonds which remain in force as evidence of the remaining 85% of the claims constitute any part of the "amount to be paid to creditors upon the confirmation of the composition", and if so, whether the Referee is entitled to commissions upon more than the actual value of the bonds so retained by creditors.

## II.

### The record is complete.

The respondent, Eugene F. O'Connor, Jr., has objected to the consideration of the petition because of the absence from the record of a certain indenture between Realty Associates Securities Corporation and Manufacturers Trust Company, as Trustee, dated as of July 10, 1933. This objection has no foundation or justification.

The indenture, pursuant to stipulation of the parties (R. 140), was not printed in the transcript of the record for the Circuit Court of Appeals. Respondent O'Connor had objected to its being printed. At the instance of the present petitioners, copies of it were handed to the Circuit Court of Appeals upon the argument of the appeal, as an exhibit, pursuant to the aforesaid stipulation (R. 140).

It was not a part of the record however, which could be certified as such by the Clerk of the Circuit Court of Appeals.

It does not appear necessary to consider the indenture in passing upon the petition for certiorari; in fact, the respondent in his brief has not even attempted to show any way in which the indenture bears upon the reasons for granting or denying the petition for certiorari.

If certiorari is granted, petitioners will present the indenture to the Court as an exhibit upon the argument of the cause. Petitioners believed in good faith, after consultation with the Clerk of this Court, that such was and is the proper practice.

To avoid any doubt at the present time, however, petitioners submit herewith copies of the said indenture for the consideration of the Court so far as may be necessary.

## III.

### This petition.

Respondent opens his brief with a reference to this Court's denial of certiorari upon a previous decision of the Circuit Court of Appeals in the bankruptcy proceeding out of which the present petition arises (*Bondholders' Committee, et al.* v. *Realty Associates Securities Corp.*, 292 U. S. 628). That matter had no relation, however, to the subject matter of the present petition.

In that matter petitioners were respondents.

The issue there was raised on an appeal by a Bondholders' Committee from an order refusing to confirm a bankruptcy composition which contemplated the payment of compensation to the Committee and its counsel (R. 3). The offer of composition there involved was modified, and again submitted to the creditors as so modified. The present petition affects the order confirming the composition as so modified, and relates only to the basis of computing the compensation of the Referee for his services during the eight months period occupied by the bankruptcy proceeding.

The denial of the former petition for certiorari constitutes no reason for this Court to refuse to review the important questions which are involved upon the present petition.

## IV.

**There are no decisions to support the holding of the Circuit Court of Appeals.**

Respondent, at page 3, quotes a half sentence of the dissenting opinion of Judge Augustus N. Hand, in order to support a misleading inference that prior decisions have agreed with the majority opinion. What Judge Hand in fact stated is (italics indicate balance of sentence of Judge Hand which respondent does not quote):

> "It is perfectly true that referees' commissions have ordinarily been figured upon the par value of notes that have been offered by a bankrupt in a composition, *but I do not find that the point that they should be valued has ever been raised and, in the absence of an objection, it may have been quite proper to value them at the face amount where no other value was suggested*" (R. 161-62).

## V.

**Respondent has not disproved the conflict between the judgment sought to be reviewed and the decisions of other Circuit Courts of Appeal.**

Respondent's Point II evades the issue. He argues (Brief, pp. 6-9) that there is no conflict between the decisions, because several Courts have held that no

discretion exists to increase the statutory compensation of a referee.

The question here is on what amount is the statutory compensation of the Referee to be computed.

The holdings cited by respondent constitute no justification for the allowance to a referee, on a mistaken valuation of the amount to be paid to creditors on a composition, of a sum greater than the statute warrants.

On the contrary, the decisions referred to by the respondent show that Courts have strictly limited the compensation of a referee to commissions on assets disbursed, and thus are additional evidence of the importance of this Court's reviewing the erroneous and excessive award which was made to the Referee in the present case.

By an ingeniously abbreviated quotation from the *Mills Tea & Butter Co.* case (235 Fed. 815), respondent attempts (Brief, pp. 8-9) to suggest that the decision there was based on the distinction between notes and stocks. The contrary is true, for the Court immediately after the passage quoted by the respondent, refers to the *Batterman* case (231 Fed. 699), where 15% cash plus 85% *notes* were computed as a 65% payment; and states, *"It seems to me that the principle of that decision applies here"* (p. 816).

Even if in the instant case the bonds which creditors retain are to be taken as part of the amount to be paid to them upon the confirmation of the composition, the respondent's statement (Brief, p. 9), that "no reasonable creditor accepts a bankrupt's note settlement with more than the hope, rather than the certainty, that it will be paid", shows the folly and injustice of valuing such notes at par. The present cause presents for review, moreover, the further

question whether bonds which are merely continued in force after the composition constitute any part of the payment to creditors.

## VI.

**Alleged inadequacy of referee's compensation furnishes no justification for allowing a fee of $65,000 for eight months work in a single case, erroneously computed upon sums not paid to creditors.**

The facts cited in the respondent's brief fail to show any inadequacy in the compensation of referees, even if such evidence could be regarded as justifying the unreasonable interpretation which in this case resulted in the allowance of $65,000 to the respondent. He makes no attempt in his brief (see p. 11), to state what proportion of the 501 referees he mentions devote full time to their work, and what proportion only part time.

A fair indication of the true facts is found in the recent report of the Sub-Committee on Equity Receiverships and Bankruptcy of the Committee on Judiciary of the United States Senate, which stated that "As a result of the fee and commission system in effect in the bankruptcy courts, instances were brought to our attention where the income of referees exceeded the salaries of the judges of the United States District Court * * *. In consideration of cases which came under our observation, we were impressed by the relatively enormous cost involved in receivership and bankruptcy cases."

(Report No. 365, 73rd Congress (Senate), 2nd Session, 78 Cong. Rec. 3173-3176.)

The suggestion that Section 77-B supersedes the composition provisions of Section 12 of the Act has

no foundation in fact. Indeed, the provisions of Section 77-B with respect to compensation of referees, permitting the court to fix such compensation at a reasonable amount, emphasize the importance of reviewing a decision which results in unreasonable compensation in a bankruptcy composition.

Moreover, there are indications that legislation may soon limit the period within which Section 77-B—essentially an emergency enactment—shall remain in effect.

## VII.

**The proof of value of the bonds retained by creditors was competent.**

It seems out of place for the Referee to argue in his brief in opposition to the granting of certiorari, that a finding of fact by the District Court, which was not reversed by the Circuit Court of Appeals, was without foundation.

If the argument were proper at this time, it would be sufficient answer without discussing its merits, that the evidence of value was admitted without objection (R. 68) although the Referee was in court (R. 71) and had opportunity to be heard.

The competency of evidence cannot be questioned unless objection is seasonably made. 1 Wigmore on Evidence, Sec. 18, page 173; *Diaz* v. *United States*, 223 U. S. 442.

## CONCLUSION.

***The petition for certiorari should be granted as prayed.***

January 26, 1935.

Respectfully submitted,

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